No. 92-1662

In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH STUART GRANDERSON, JR.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Under 18 U.S.C. § 3565(a), when a court finds that a defendant has been "in possession" of a controlled substance, the court must revoke the sentence of probation and sentence the defendant to "not less than one-third of the original sentence." The phrase "original sentence" is not defined. The question presented is whether the court of appeals was correct in concluding that the phrase "original sentence" was not more than the maximum term of imprisonment under Mr. Granderson's sentencing guidelines range established at the time of his initial sentencing?

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STATEMENT OF THE CASE

Following his honorable discharge from the Army, Ralph Stuart Granderson, Jr. worked for 5½ years as a United States Postal Service carrier. Pet. Opp. App. 11a at ¶¶ 41 & 45. He regularly filed income tax returns. *Id.* 13a at ¶ 55. He had no prior convictions or even arrests. *Id.* 8a-9a at ¶¶ 27-31.

After an investigation suggested that Mr. Granderson might be tampering with mail, postal inspectors placed a "test case" letter in his mail bag and later found the letter in his shoe. *Id.* 6a-7a at ¶ 13. Mr. Granderson signed a sworn statement admitting his criminal activity. He offered to repay the money and asked, if possible, to keep his postal job. *Id.* 7a at ¶¶ 14-15.

Instead, Mr. Granderson resigned that same day from his job, which paid $29,881 annually plus benefits. *Id.* 7a at ¶ 16;

11a at ¶ 41. He surrendered his only real asset, a truck, to creditors. With $26,139 of indebtedness, he was forced to consider bankruptcy. *Id.* 13a at ¶¶ 56-57. Mr. Granderson nevertheless did not seek public assistance, but kept working. He found and maintained consistent employment, and he paid full restitution, *id.* 7a at ¶ 21, even though his wages had dropped to $4.50 per hour. *Id.* 10a at ¶¶ 38-40. At the car wash job he held from September 1990 until his incarceration for violating probation, Mr. Granderson's work habits and attendance were good. He was one of his employer's most reliable workers, his attitude toward customers was described as excellent, and his boss called him a team leader. *Id.* 10a at ¶ 38.

On January 11, 1991, Mr. Granderson pled guilty to one count of delay or destruction of mail, in violation of 18 U.S.C. § 1703(a). J.A. 4-5; Pet. App. 2a. A Presentence Report calculated his range under the United States Sentencing Guidelines of 0-6 months. Pet. Opp. App. 20a. On March 18, 1991, Judge William C. O'Kelley adopted this range, Pet. App. 12a, and imposed five years of probation, a $2000 fine and a $50 assessment. R1-7, at 2, 4.

On June 28, 1991, a probation officer petitioned to revoke Mr. Granderson's probation. The petition alleged that Mr. Granderson "possessed/used drugs in that . . . Probationer rendered [two] urine samples which tested positive for cocaine metabolite." J.A. 6-7.

At a revocation hearing held July 29, 1991, the district court found Mr. Granderson "in possession" of a controlled substance, requiring a sentence of "not less than one-third of the original sentence" under 18 U.S.C. § 3565(a). J.A. 16 & 18. The district judge noted, "The question is: What was the original sentence? In this case there was no original sentence to jail." J.A. 12.

The Government explained its position that the five years of probation represented the "original sentence." J.A. 12-13. The Assistant United States Attorney conceded, "It's very hard and I had difficulty conceptualizing probation as the sentence," but then stated, "that is the interpretation." J.A. 13.

The court told Mr. Granderson, "I just don't feel I have any choice but to revoke probation and impose 20 months." J.A. 19. The court openly declared that its sentence was unjust. *See, e.g.*, J.A. 18 ("I have real difficulty with it"); J.A. 18 ("applying a bunch of numbers in a very drastic method"); J.A. 18 ("I would certainly not impose the 20 months under the Guidelines"); J.A. 19 ("I frankly don't like it"); J.A. 20 ("it's not an interpretation I like"); J.A. 21 ("I'm very sympathetic with your argument").

> But 10 times more or a mandatory four times more [than the maximum sentence you could have received within your sentencing guideline range] is a little harsh. But that's what you get when you start dealing with statistics and mathematics instead of human beings.

J.A. 15-16.

> There's no other way to describe them other than they're harsh . . . even by my standards let me say they're harsh, and my standards are not known to be lenient.

J.A. 19.

> I don't object to your appealing this, certainly. . . . I would hope you would appeal it and win. I don't often like to be reversed, but if you did, it would be a case that wouldn't bother me on the interpretation of the law issue.

J.A. 22. The district judge imposed three years of supervised release to follow Mr. Granderson's imprisonment. J.A. 21.

Mr. Granderson appealed, and the court of appeals vacated his sentence. *United States v. Granderson*, 969 F.2d 980 (11th Cir. 1992), *cert. granted*, 113 S. Ct. 3033 (1993). The court of appeals noted first that § 3565(a) was ambiguous, in part because "[t]he statute does not specify whether the term 'original sentence' refers to the term of probation or to the range of incarceration established by the Guidelines." *Id.* at 983.

Second, the court of appeals noted that its ruling did not bar the Government from seeking further punishment if it

deemed the revocation sentence inadequate. *Id.* at 983 ("The Government was free to indict him on drug charges but chose not to do so.").

Third, the court of appeals noted the Sentencing Commission's view of probation as a trust, with penalties for violating probation treated as sanctions for breaches of that trust rather than sentencings for new criminal conduct. Because Mr. Granderson faced no more than 6 months in prison under the range established at his initial sentencing, he should not be subject to more than that for revoking probation absent a basis for departure:

> The length of Granderson's original sentence is limited by the Guideline range available at the time he was sentenced to probation. If Granderson could not be subjected to [twenty] months incarceration for the crime of which he was convicted, he cannot now be sentenced to that term for violation of his probation.

Id. at 983.

Fourth, the court of appeals disagreed with the Government's view that a term of probation was the "original sentence":

> Probation and imprisonment are not fungible. As the Third Circuit noted, probation is a form of "conditional liberty" that is likely to be longer than a term of imprisonment. In this case, *instead* of a possible six months incarceration, Granderson received five years probation, a restraint on his liberty that is less severe than imprisonment, but lasts ten times longer. The trade-off was undoubtedly worthwhile to the defendant and illustrates the fallacy of simply converting a term of probation into one of incarceration without taking these differences into account.

Id. at 984 (emphasis in original).

Finally, the court of appeals rejected the Government's claim that § 3565(a) was analogous to § 3583(g), which covers revocations if a person possesses controlled substances on supervised release:

> Supervised release . . . is different from probation. When a defendant receives a sentence of probation, it is an *alternative* to imprisonment; a defendant serving time on supervised release has already served his sentence of incarceration. . . .

Id. at 984 (emphasis in original). Finding the statute ambiguous, the court of appeals applied the rule of lenity. *Id.* at 983.

The court of appeals immediately issued its mandate and ordered Mr. Granderson released from custody. The Government filed a suggestion of rehearing *in banc*, which was denied. Pet. App. 16a-17a. The Government later filed a petition for a writ of certiorari, which was granted on June 28, 1993. J.A. 36.

In the meantime, on October 20, 1992, the court of appeals clarified its ruling and remanded the case for the district judge to decide whether supervised release should be reimposed. U.S.S.G. § 5D1.1(b) (unless incarceration exceeds 12 months, supervised release not mandatory). At a resentencing, held April 23, 1993, Mr. Granderson showed that he had complied with all conditions of supervised release in the eight months since his release from jail. J.A. 25 & 31. He worked steadily as a dishwasher and cook. J.A. 30. He reported regularly to his probation officer. He had never missed a single payment on his fine. J.A. 30. His supervising probation officer wrote a letter stating that Mr. Granderson was doing everything according to plan. J.A. 25 & 32-33. The Government stated that its "only concern in this matter is that the fine that the Court imposed is paid." J.A. 28. The court reduced Mr. Granderson's supervised release term to two years. J.A. 34. Since then, no further negative proceedings have ensued.

SUMMARY OF THE ARGUMENT

The history of probation, the language, context and application of § 3565(a), its legislative history, and the rule of lenity all support the court of appeals' interpretation.

1. Traditionally, probation has been viewed as a trust, with revocations of probation treated as breaches of that trust.

The Government seeks a radical departure from that history by forcing defendants to accept an alternative to incarceration only at the risk of substantially increasing their potential jail exposure.

Conceding this departure, the Government argues that Congress "rejected the traditional view" of probation in the Comprehensive Crime Control Act of 1984 simply by calling probation a "sentence." Nothing suggests that this amendment was anything more than a semantic change. The fundamental nature of probation was retained in every respect. The 1984 Act's legislative history confirms that the changes were not fundamental. The Sentencing Commission created by that same 1984 Act still treats probation as a trust, with revocations treated, as they traditionally were, as breaches of that trust.

2. The statutory language also rebuts the Government's view of § 3565(a). "Original sentence" is not defined, and its "ordinary" meaning, according to the Government's own definitional source, suggests that a "term of probation" cannot be the original sentence. Congress' prior uses of the phrase "original sentence" typically did not even include, much less unambiguously and exclusively mean, a term of probation.

Section 3565(a) involves a mandatory minimum penalty. It is unlikely that Congress wanted the minimum's benchmark, an "original sentence," determined by the very judges whose power Congress was trying to curtail, as would be true if "original sentence" means the "term of probation" imposed by those same judges. Congress instead wanted the mandatory minimum to be one-third of a benchmark it controlled – the guidelines, which Congress established to restrict judicial discretion and eliminate sentencing disparities.

The Government's own reading of § 3565(a) confirms that its interpretation is not the "plain" meaning. Even the Government concedes that the "natural" reading it espouses yields an absurd result: a *shorter* term of probation. Rather than conceding that this dead end suggests ambiguity, the Government asks this Court to cure this admitted problem with its analysis by adopting the "length" and rejecting the "type" of its "sentence of probation." This "hybrid" approach

exceeds any reasonable "plain" meaning of § 3565(a), and nonsensically causes the word "sentence" in the relevant passage to mean "incarceration" at one point and "probation" only twelve words later.

The more natural reading of the statute is one that does not create a "hybrid," but rather logically relies on the "length" that matches the "type" of sentence – the defendant's originally established guidelines range. Mr. Granderson shows that "original sentence" was meant as a short-hand reference to a longer antecedent phrase contained in the immediately preceding sentence, in § 3565(a)(2). Thus, when sentencing a probationer who has possessed a controlled substance, the court can no longer rely on the sentencing options available in § 3565(a)(1), but must sentence the defendant to not less than one-third of the sentence specified in § 3565(a)(2) – the "sentence that was available under subchapter A at the time of the initial sentencing," a phrase universally interpreted by courts of appeals to refer to a probationer's guideline range. This "natural" reading does not yield an absurdity that must be cured, and also is consistent with the traditional view of probation revocations as breaches of trust.

3. The context of § 3565(a) confirms this. While the Government claims that "original sentence" means the term of probation imposed, Congress' decision to use the phrase "original sentence," rather than "sentence of probation" or "sentence imposed" – phrases used repeatedly in adjoining sections – suggests that Congress intended a different meaning here.

This conclusion is bolstered by comparing § 3565(a) with the statute governing revocations of supervised release for drug possession, 18 U.S.C. § 3583(g), passed in the same section of the 1988 Act as § 3565(a). While the Government claims that Congress intended to give "parallel" treatment to persons covered by these two statutes, the statutes themselves use very different language – one-third of the "original sentence" in § 3565(a), versus one-third of the "term of supervised release" in § 3583(g). At least two lower courts have found that Congress' failure to use "term of probation" in

§ 3565(a), a phrase used elsewhere and one that would have tracked § 3583(g) if parallel treatment had been intended, proves that Congress rejected the Government's interpretation, even without resort to the rule of lenity. The Government's attempts to distinguish this conspicuous difference, through speculation as to the sections' drafting order, still fail to explain why Congress chose language so different.

Other differences also exist between § 3565(a) and § 3583(g). The supervised release provision specifies that, upon revocation, the defendant must spend the one-third term "in prison." This language is absent from § 3565(a), undercutting the Government's position that this Court can "no doubt" infer incarceration as the "type" prong of its hybrid sentence.

It is unlikely that Congress intended the "parallel" treatment the Government suggests. Supervised release and probation are not equivalent or even similar. Persons on supervised release necessarily have spent time in jail, and include the most serious criminal offenders. Those on probation, by contrast, are among the least culpable. Supervised release terms are graded according to the seriousness of the offense and are designed to be converted into prison time. This is unlike probation, since even misdemeanants can receive probation terms as long as five years.

Even if parallel treatment would be rational, the Government's view of § 3565(a) does not provide parallel treatment. Instead, it yields an odd result in which, for the same violation of drug possession, less culpable defendants (probationers) often receive longer sentences than more culpable defendants (defendants on supervised release). It is unlikely Congress intended to simultaneously adopt such an inequitable disparity.

This conclusion is bolstered by the revocation statute for drug possession on parole, also passed alongside § 3565(a). That provision provides that parole must be revoked, but gives no mandatory one-third term. The likely reason is that parole guidelines existed, and Congress relied upon them. Under those guidelines, simple drug possession yields a presumptive range, even for the worst parolees, of only 12-16 months. Again, the Government's view of § 3565(a) yields an

odd result in which the least culpable (probationers) receive *minimum* sentences for the same violation that are longer than the presumptive *maximum* for the most culpable (parolees with the poorest salient factor scores). In fact, probationers' minimum sentences would exceed the statutory *maximums* for those *convicted* of possessing drugs *in jail*.

For drug possession revocations, the parole guidelines yield ranges of 0-4 and 0-8 months for defendants with good salient factor scores – the same "good" candidates who might be eligible for probation under the guidelines system. These ranges are consistent with § 3565(a)'s reliance on the similarly severe sentences that would be created by taking one-third of a defendant's established guideline range. Reliance on parole ranges also explains that Congress was not "awkward" in having its phrase "original sentence" refer to a "range." Once established, guideline ranges for each defendant do not change. This is more stable than terms of probation, which may have been modified since their imposition.

4. Application of the Government's interpretation yields further problems. Because misdemeanants may receive up to five years of probation, the Government's view of § 3565(a) yields mandatory revocation sentences above the statutory maximum punishments. When the Sentencing Commission's revocation guidelines are analyzed, the Government's view also yields *minimum* sentences for those *possessing* drugs higher than the *maximum* ranges for those *manufacturing or distributing* the drugs.

Recognizing its problems, the Government submits what is, in essence, an *optional* "plain" meaning for this Court's consideration. The Government now suggests for the first time that "original sentence" may mean the offense statutory maximum. Even if this were a reasonably "plain" construction discovered by the Government only after years of litigation, this optional plain meaning creates even greater disparities than the Government's first "plain" meaning, and cannot be what Congress intended.

5. Rather than the "harsh medicine" the Government suggests, the Act's hurried legislative history reveals a "measured" approach, in which "user accountability" penalties

were tempered by both judicial discretion and waivers of sanctions for those agreeing to drug treatment. Except for crack cocaine, simple drug possession remained a misdemeanor even after the 1988 Act, with minimum sentences of only a $1000 fine for a first conviction, and only 15 days in jail and a $2500 fine even for *repeat* convictions. Congress did not intend for § 3565(a) to mandate long prison sentences based on the arbitrary length of probation terms, a suggestion confirmed by subsequent legislative history.

6. The court of appeals' interpretation of § 3565(a) satisfies Congress' deterrent goals. The Government can seek a serious revocation sentence, where it is warranted, even without the harsh interpretation it suggests. It can seek a long period of supervised release to follow, and a long supervised release revocation sentence for any later violation. It also can separately prosecute a defendant for drug possession.

Applying the rule of lenity in this case would further that rule's goals of minimizing the risk of discriminatory and arbitrary enforcement, and of avoiding incarceration not clearly intended by Congress. The rule of lenity would not show undue leniency to wrongdoers, since even the court of appeals' interpretation yields a minimum sentence for probation violators, found to have possessed drugs by a mere preponderance of the evidence, that is four times as long as the minimum sentence for *repeat* offenders *convicted* of possessing those same drugs. This Court should follow the majority of circuits and reject the Government's § 3565(a) analysis.

ARGUMENT AND CITATION OF AUTHORITIES

Describing 18 U.S.C. § 3565(a) as unambiguous, Gov't Br. at 29, as it must to avoid the rule of lenity, the Government contends that the "only reasonable construction" is one that "mandates a sentence of imprisonment that is at least one-third as long as the defendant's original term of probation." *Id.* at 11. Although the Government describes this construction as the "ordinary" and "natural meaning" of the statutory language, *id.* at 7 & 16, one of the three steps in its analysis involves repudiating the plain meaning it proposes.

The historical background of probation; the language, context, application and legislative history of § 3565(a); and the rule of lenity all militate against the Government's interpretation. The statute instead is best read to require the imposition of only a sentence of one-third of the sentence available under subchapter A (18 U.S.C. §§ 3551-3559) at the time of the initial sentencing.

I. Congress' Reference to Probation as a "Sentence" Was Not Meant to Overrule Centuries of Common-Law Treatment of Probation

For hundreds of years, probation has been viewed not as something equivalent to or convertible into incarceration, but as a trust, with revocations of probation treated as abuses of that trust. Probation has been described as "a period of grace" that provides "an opportunity for reformation which actual service of the suspended sentence might make less probable," *Burns v. United States*, 287 U.S. 216, 220 (1932), as "a system of tutelage," *Frad v. Kelly*, 302 U.S. 312, 318 (1937), and more recently, as "conditional liberty." *Black v. Romano*, 471 U.S. 606, 611 (1985).

> [T]he use of probation as an alternative to incarceration dates back to the year 1681. *United States v. Stine*, 646 F.2d 839, 841 (3d Cir. 1981); *see also id.* at 841-42 (first state probation statute enacted in 1878; federal probation statute enacted in 1925). To say that the nature of probation is well-settled would be an understatement.

United States v. Gordon, 961 F.2d 426, 432 (3d Cir. 1992).[1]

This historical treatment of probation is inconsistent with the Government's proposed § 3565(a) interpretation. Rather than treating probation as a trust, the Government's view

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[1] Probation revocations are not treated as sentences for new criminal conduct because the Government can bring a separate criminal charge if it is dissatisfied with the revocation sentence. *See Granderson*, 969 F.2d at 983 ("Possession of cocaine provided the reason for revocation of probation, but it is not the crime for which Granderson is incarcerated.").

forces probationers to accept an alternative to incarceration only at the price of subjecting themselves to the risk of a far higher minimum revocation sentence than their original maximum guideline sentence.

Conceding radical departure from common law, the Government claims that the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987 (the "1984 Act"), by calling probation a "sentence," thereby "rejected the traditional view of probation." Gov't Br. at 12. While Congress obviously *could* reject this history of probation, the Sixth Circuit was probably reasonable in noting, "Given this traditional understanding of probation, the onus was on Congress to make it absolutely clear" that its changes were meant to abandon several hundred years of precedent. *United States v. Clay*, 982 F.2d 959, 962 (6th Cir. 1993), *cert. filed*, No. 93-52 (U.S. filed July 6, 1993).

The fundamental changes in probation suggested by the Government are not revealed in the Act or its legislative history. The 1984 Act codifies that probation is still an alternative to incarceration. 18 U.S.C. § 3551(b). Unlike traditional sentences, which are final and cannot be increased once imposed, probation remains within a court's jurisdiction and may be modified later. *Id.* § 3563(a); *see* S. Rep. No. 98-225, at 99, 1984 U.S.C.C.A.N. 3282 ("This provision brings forward the substance of current law."). Unlike traditional sentences, a person whose probation is revoked cannot claim credit for non-custodial "street time" spent on probation, on the ground that this was service of a "sentence."

The legislative history of the 1984 Act confirms that calling probation a "sentence" was meant as a semantic change:

> In keeping with modern criminal justice philosophy, probation is *described as* a form of sentence rather than, as in current law, a suspension of the imposition or execution of sentence.

S. Rep. No. 98-225 at 88, 1984 U.S.C.C.A.N. at 3271 (emphasis added). The change was made to promote the Act's goal of honesty in sentencing. S. Rep. No. 98-225, at 56, 1984 U.S.C.C.A.N. at 3239 ("Under the bill, the sentence imposed

by the judge will be the sentence actually served."). The Senate Report stressed that the Act's changes were *not* fundamental. While "split sentences" technically were eliminated, the Report noted, "The same result may be achieved by a more direct and logically consistent route – under sections 3581 and 3583, the court may provide that the convicted defendant serve a term of imprisonment followed by a term of supervised release." *Id.* at 89, 1984 U.S.C.C.A.N. 3272. Calling probation a sentence was "merely a change in form, rather than substance." *Gordon*, 961 F.2d at 432.

The Sentencing Commission created by this same 1984 Act confirms that probation revocations are still to be treated as breaches of trust. As noted by the court of appeals:

> [T]he Sentencing Commission established that resentencing for violations of probation should sanction primarily the "defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." The Guidelines explicitly reject resentencing violators for the particular conduct triggering the revocations "as if that conduct were being sentenced as new federal criminal conduct."

Granderson, 969 F.2d at 983 (citations omitted).

Calling probation a "sentence" was not designed to force an increase in probationers' revocation sentences. The 1984 Act's changes instead were designed to "permit latitude" and allow courts to be "more flexible" than previous law: "[T]his flexibility will permit the court to formulate a sentence best suited to the individual needs of the defendant." S. Rep. No. 98-225, at 89, 1984 U.S.C.C.A.N. at 3272. *See also id.* at 39, 1984 U.S.C.C.A.N. at 3222 (revisions "should assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case"). The Act's changes also were designed "as a means of achieving the purposes of sentencing set forth in section 3553(a)(2)." *Id.* at 90, 1984 U.S.C.C.A.N. at 3273. Section 3553 specifically provides that the sentence imposed shall be

"sufficient, but not greater than necessary, to comply with" those purposes.

Thus, rather than being abandoned in the 1984 Act, "judicial discretion" and "minimum necessary sentences" were embodied within it. Nothing in the 1984 Act or the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (the "1988 Act"), shows that Congress "rejected the traditional view" of probation. *Gordon*, 961 F.2d at 432 ("It is inconceivable to us that Congress intended to modify over three hundred years of jurisprudence through a minor statutory provision."). Because there is no clear indication of a "contrary direction" from the "cluster of ideas" surrounding courts' understanding of probation, *Evans v. United States*, 112 S. Ct. 1881, 1885 (1992), this history of probation strongly undermines the Government's suggested view of § 3565(a).

II. The Language of the Statute Favors the Court of Appeals' Interpretation of § 3565(a)

The Government claims that the court of appeals' decision is "impossible to square with the language, structure and purpose of [§] 3565(a)." Gov't Br. at 16. The Government's attempt to shift the burden is improper. The Government must present an unambiguous statute; otherwise, the rule of lenity must be applied even if the ambiguity causes concern with the court of appeals' interpretation as well. *Ladner v. United States*, 358 U.S. 169, 178 (1958) (apply rule of lenity when "no more than a guess as to what Congress intended"). More importantly, once the statute is examined, the court of appeals' view of § 3565(a) is more consistent with the natural meaning of the phrase than the Government's interpretation.

A. The Words of the Statute Support the Court of Appeals' Analysis

1. The Government concedes that there is no "definition of the word 'original' as it is used in Section 3565(a)." Gov't Br. at 15-16. It therefore must rely on the "natural" meaning

of the statute to support its contention that the phrase is unambiguous.

2. The term of probation is not the "original" sentence. While the Government cites Webster's for its claim that "the word 'original' plainly means 'initial,' " Gov't Br. at 16, the Government quotes only part of the Webster's definition. The *entire* definition of "original," used as an adjective, follows:

> original (adj) 1a: of or relating to a rise or beginning; existing from the start; initial; primary; pristine; <original plans called for many films to be made simultaneously – Cecile Starr> <the forests were in large part original – J.M. Mogey>; b: constituting a source, beginning or first reliance <the original account of the mutiny . . . as recorded by two of the survivors – F.R. Dulles>; 2a: taking independent rise; having spontaneous origin; *not secondary, derivative or imitative*; fresh, new <gives us, as all good poetry does, an original angle of vision – C.D. Lewis>; b: gifted with powers of independent thought, direct insight, or constructive imagination; creative, fertile, germinal, inventive <esteemed as an original American composer>; c: constituting the product or model from which copies are made <found the original manuscript of which copies had long been current> syn see new

Webster's Third New International Dictionary 1592 (1986) (emphasis added). When this entire definition is examined, Mr. Granderson's 0-6 month sentencing range best fits the ordinary and natural meaning of "original sentence." As the first individual sentencing determination made of Mr. Granderson, his established range was the sentence "of or relating to a rise or beginning;" the sentence "constituting a source;" the sentence "constituting the product or model from which copies are made."[2] Mr. Granderson's term of probation, by

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[2] The Government incorrectly claims Mr. Granderson seeks to *substitute* the word "available" for "original." Respondent has never argued that a probationer possessing drugs must receive one-third of the "available"

contrast, is exactly what Webster's says is *not* original, since it is "secondary" to and "derivative" from the "source," Mr. Granderson's guidelines range. *See also* 18 U.S.C. § 3742 (describing sentence imposed as "otherwise final" sentence).

3. The term of probation also was not meant to be the "sentence" in § 3565(a)'s "original sentence." Even the Assistant United States Attorney admitted that it was "very hard" and "difficult[] conceptualizing probation as the sentence." Congress' other uses of the phrase "original sentence" confirm this.

In 18 U.S.C. § 4214(d)(4), Congress discusses the Parole Commission's ability to "refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence." Obviously, "sentence" in this context refers to incarceration, and could not have meant "term of probation," since the Parole Commission has no authority over a probationer.

Similarly, the court-martial statute, 10 U.S.C. § 863, states that "[u]pon a rehearing . . . no sentence in excess of or more severe than the original sentence may be imposed." In this context as well, "original sentence" clearly meant incarceration, and did not include probation. This language was added in 1956, at a time when the Government concedes probation was not even called a "sentence." Congress' past uses of "original sentence," in contexts in which probation was not even theoretically included, hardly suggests that probation is now to be its exclusive meaning.

The Government nevertheless also cites Fed. R. Crim. P. 35(a)(2), which states that a district court must correct a sentence, upon remand from a court of appeals for further sentencing proceedings, if it finds after those proceedings that the "original sentence" was incorrect. Even in this context, it is not clear that "original sentence" includes a "term of probation." A term of probation is granted at the discretion of the district court, and is not reviewable on appeal in most

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(i.e., *currently* available) sentence. He does not seek to remove the meaning of "original" from § 3565(a).

contexts. Even when it is reviewable, its imposition is something a court of appeals, rather than a district court on remand, would determine to be "incorrect." If probation is deemed "incorrect," the appellate court will vacate the probation and remand the case for imposition of a sentence in accord with its findings under Rule 35(a)(1); there would seem no need for further district court proceedings under Rule 35(a)(2) – especially since a district judge can modify a term of probation without the need for a finding that the initial probation term was "incorrect." 18 U.S.C. § 3565(a).

B. Section 3565(a)'s Structure Supports the Court of Appeals' Analysis

1. Section 3565(a) involves a mandatory minimum penalty. It is not a typical mandatory minimum statute, however. Rather than selecting a precise minimum to impose, Congress set the mandatory penalty at one-third of an "original sentence" determined by someone other than Congress. If the purpose of a mandatory minimum statute is to limit judicial sentencing discretion, it is less likely that Congress based its standard on an "original sentence" (length of probation) chosen by the judges themselves, than on an "original sentence" (the guideline range) that Congress established to control those judges and eliminate sentencing disparities.

2. The Government itself concedes that construing the phrase "original sentence" as "sentence of probation" leads to an absurd result. So construed, § 3565(a) would require courts to revoke the sentence of probation and "sentence the defendant to not less than one-third of the original sentence of probation," reducing Mr. Granderson's 60 months of probation to 20 months of probation.

The Government seeks to avoid this dead end by arguing that "original sentence" refers only to the *length*, and not the *type*, of its "sentence." The Government identifies nothing in the structure or language of § 3565(a) to justify its choice of those attributes of a "sentence of probation" that it wishes to incorporate into the phrase "original sentence," and to discard those attributes less to its liking. Indeed, such selectivity

leads to an unnatural result. Under § 3565(a), courts must "sentence the defendant to not less than one-third of the original sentence." *The Government's construction causes the word "sentence" to mean "incarceration" in one place and "probation" just twelve words later.*[3]

Moreover, even the "length" of the Government's "original sentence" is unclear. A "fine" also is described in the 1984 Act as a "sentence" – in the same way probation is called a "sentence." 18 U.S.C. § 3551(b)(2). *See also id.* § 3551(b) & (c) ("A sentence to pay a fine"); *id.* § 3571(a) ("may be sentenced to pay a fine"); *id.* § 3572(d) ("A person sentenced to pay a fine"); *id.* § 3572(e) ("sentenced to pay a fine"); *id.* § 3574 ("a sentence to pay a fine"). If a person receives five years of probation with a fine payable over the first year, even the term of the sentence imposed is ambiguous. *See Gordon*, 961 F.2d at 426 ("Our conclusion that [calling probation a "sentence" was] semantic and not substantive is bolstered by the fact that the 1984 act also refers to the imposition of a 'sentence of fine.' We are confident that Congress did not intend to equate the paying of fines with imprisonment.").

2. There is no need for a "hybrid" interpretation of § 3565(a) that adopts the "length" but not the "type" of a "sentence of probation." Instead, "original sentence" is best read as a short-hand reference to the longer antecedent phrase "sentence that was available under subchapter A at the time of the initial sentencing," which appears in the immediately preceding sentence, in § 3565(a)(2).

As the Government itself explains, § 3565(a) provides that courts normally have wide discretion when a defendant violates probation. A court may continue or extend the defendant on probation, with or without changing its conditions. *Id.* § 3565(a)(1). Alternatively, a court may revoke the sentence of probation and impose "any other sentence that was

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[3] The fact that "sentence" is used as a noun in one place and a verb in the other makes no difference. *See Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993).

available under subchapter A at the time of the initial sentencing." *Id.* § 3565(a)(2).

The final sentence of § 3565(a), however, which is introduced by the word "[n]otwithstanding," clarifies that courts do not have such discretion when a defendant possesses drugs on probation. Instead, the final sentence limits courts to the second and more restrictive of the two options set forth in the immediately preceding subsections: subsection (a)(2) – *i.e.*, a sentence "that was available under subchapter A at the time of the initial sentencing." The courts of appeals have consistently found that this phrase refers to the defendant's guideline range. *United States v. Boyd*, 961 F.2d 434, 438 (3d Cir.), *cert. denied*, 113 S. Ct. 233 (1992); *United States v. Alli*, 929 F.2d 995, 998 (4th Cir. 1991); *United States v. Williams*, 961 F.2d 1185, 1187 (5th Cir. 1992); *United States v. Von Washington*, 915 F.2d 390, 391 (8th Cir. 1990); *United States v. Dixon*, 952 F.2d 260, 261 (9th Cir. 1991); *United States v. Maltais*, 961 F.2d 1485, 1487 (10th Cir. 1992); *United States v. Smith*, 907 F.2d 133 (11th Cir. 1990). Finding the guidelines implicit in the sentences "available under Subchapter A" is consistent with *United States v. R.L.C.*, 112 S. Ct. 1329 (1992), in which this Court held, under the juvenile delinquency statute, 18 U.S.C. § 5037(c)(1)(B), that a sentencing court must apply corresponding adult guidelines, even when those guidelines are not expressly mentioned in the statute.

The Government argues that the word "notwithstanding" shows that "Congress meant the phrase 'original sentence' to have a meaning distinct from the phrase 'sentence that was available.' " Gov't Br. at 18. As explained by the Sixth Circuit, however:

> [The Government's argument] does violence to [a] basic principle of statutory construction. When interpreting the effect of a new law upon an old one, "[o]nly a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy." Without a clear expression of congressional intent to the contrary, we should try to reconcile, as much as possible, the anti-drug abuse amendment to the

> rest of Section 3565(a). . . . By interpreting "original sentence" to refer to the sentence of imprisonment that could have been imposed originally, less violence is done to Section 3565(a)(2). . . .

Clay, 982 F.2d at 963 (citations omitted).

The final sentence of § 3565(a) adds one further limitation on the courts' discretion: it requires a sentence that is "not less than one-third of the original sentence." It thus requires courts to impose a revocation sentence not less than one-third of the "sentence that was available under subchapter A at the time of the initial sentencing" – a defendant's established guideline range.

This construction is supported, not undermined as the Government suggests, by the language of § 3565(b). Subsection (b) provides that where a probationer possesses a firearm, the court "shall . . . revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing." 18 U.S.C. § 3565(b). This provision confirms that even resentences based on specific probation revocation statutes are to be based on sentences available under subchapter A.

The Government nevertheless argues that "[h]ad Congress intended the two [subsections] to have the same meaning, it is reasonable to suppose that Congress would have used the same language in each." Gov't Br. at 18. This argument loses its force when one examines the structure of §§ 3565(a) and (b). Having specified "the sentence that was available under subchapter A" in § 3565(a)(2), Congress could, in the sentence that immediately follows, reasonably use the phrase "original sentence" as a short-hand reference to this antecedent, and longer phrase. Subsection (b), by contrast, lacks such an antecedent; thus, Congress had no choice but to spell the concept out anew in that provision. This plausible explanation renders the Government's "assumption" of disparate meanings wholly inapplicable. *Cf. Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991).

C. Other Provisions' Language Confirms the Court of Appeals' Analysis

1. No similar conclusion can be reached in reviewing the language Congress could have used if it had wanted the Government's result. If Congress intended "original sentence" to mean "sentence of probation," it could have used that language. While the Government cites statutory references to "sentence of probation" in an effort to show that probation is a sentence, it ignores a more significant point: Congress plainly knew how to specify a "sentence of probation" when it wanted to do so, yet it did *not* do so in the critical portion of § 3565(a) here. The clear inference is that "original sentence" does not mean "sentence of probation."

2. Similarly, if Congress had meant for "original sentence" to refer to the sentence "imposed," Congress could have said that. Congress used similar language in numerous sections of the Code. *See* 18 U.S.C. § 3552(b) ("sentence to be imposed"); *id.* § 3553(a) ("particular sentence to be imposed"); *id.* § 3553(a)(2) ("sentence imposed"); *id.* § 3553(c) ("imposition of the particular sentence"); *id.* § 3557 ("sentence imposed"). It did not do so here.

3. Finally, if Congress had meant for "original sentence" to refer to the "term of probation," it could have said that. This language already had been used in other statutes nearby, *id.* § 3561(a) ("term of probation"); *id.* § 3564(a) ("term of probation"), and it would have tracked the "term of supervised release" language found in what the Government submits is the "parallel" provision of § 3583(g). Congress did not use that phrase here. The fact that these two provisions were passed side-by-side, and yet used such different language, led two lower courts to determine that § 3565(a) unambiguously must be resolved against the Government, without any need for the rule of lenity. *Gordon*, 961 F.2d at 431-32; *United States v. Roberson*, 805 F. Supp. 879, 880-82 (D. Kan. 1992), *aff'd*, 991 F.2d 627 (10th Cir. 1993).

The Government attempts to explain this lack of "parallel" language by claiming that the phrase "original sentence" would make no sense in a supervised release context, because

supervised release "is merely a 'part of' a sentence" rather than "a separate sentence in its own right." Gov't Br. at 27. Probation, however, also is often only "part of" of a sentence initially imposed, since the sentence imposed may include a fine. 18 U.S.C. § 3551(b). Moreover, the Government's analysis assumes that Congress started with the phrase "original sentence" in the probation statute, and then decided how to write the supervised release statute. This suggested order of drafting is guesswork.[4] It is just as reasonable to conclude that Congress did not want probationers to face one-third of their term of probation – especially since it used the phrase "term of probation" elsewhere.

4. Congress could have utilized several phrases used elsewhere to clarify § 3565(a). If "original sentence" was intended as a short-hand reference to one of these phrases, the most unwieldy provision needing a short-hand reference would appear to be the lengthy phrase contained in § 3565(a)(2) – rather than the short phrases that would have established the Government's meaning. As the Government conceded in its certiorari petition:

> To be sure, Congress did not make its meaning as clear in Section 3565(a) as it did in Section 3583(g); Section 3565(a) would have been clearer if Congress had not simply referred to "one third of the original sentence" but had referred instead to "one third of the original sentence of probation."

Gov't Pet. at 12. *Cf. United States v. Bass*, 404 U.S. 336, 347 (1971) (rule of lenity applied where Government certiorari petition "concedes that 'the statute is not a model of logic or clarity.' ").

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[4] Even assuming the Government's suggested drafting order, the Government still fails to explain why Congress would not have used a phrase such as "original term" in § 3583(g), which would have tracked the "original sentence" language in § 3565(a), if parallel treatment had been desired.

III. Section 3565(a)'s Context Unambiguously Supports the Court of Appeals' Analysis

The context in which § 3565(a) was passed further undermines the Government's view. The so-called "parallel" supervised release provision passed beside it, 1988 Act § 7303(b), *codified at* 18 U.S.C. § 3583(g), as well as the parole provision passed alongside the supervised release provision, 1988 Act § 7303(c), *codified at* 18 U.S.C. § 4214(f), reveal that the Government's interpretation of § 3565(a) cannot be what Congress intended.

A. The Supervised Release Revocation Subsection of § 7303

The Government claims that Congress "obviously viewed" § 3565(a)'s probation and § 3583(g)'s supervised release revocation provisions "as parallel and closely related." Gov't Br. at 26. The Government states that it is "reasonable to construe them *in pari materia* to call for parallel treatment of drug offenders who are under non-custodial supervision." *Id.* at 26-27.

1. Any intended "parallel" treatment for those on probation and supervised release is not evident from the statutes. The language in the two provisions certainly is not "parallel":

[I]f a defendant is found by the court to be in possession of a controlled substance . . . the court shall revoke the sentence of the probation and sentence the defendant to not less than one-third of the original sentence.	If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of the supervised release and require the defendant to serve *in prison* not less than one-third of the *term of supervised release*.
18 U.S.C. § 3565(a).	18 U.S.C. § 3583(g) (emphasis added).

2. There are reasons for these distinctions. Supervised release is very different than probation. Supervised release

is imposed only on defendants who have actually been incarcerated. *Id.* § 3583(a). Probation, by contrast, is an alternative to incarceration. *Id.* § 3551(b). Persons on supervised release include serious offenders, such as Class A and Class B felons. *Id.* § 3583(b). Probation, by contrast, is not even statutorily available to such offenders. *Id.* § 3561(a)(1). In fact, probation is not available if the defendant receives any imprisonment, even for an unrelated offense. *Id.* § 3561(a)(3). Even if statutorily authorized, probation is available only to persons whose sentencing guidelines fit within Zone A or B of the Sentencing Table. U.S.S.G. § 5C1.1. Even where probation is authorized by the guidelines, it is received only when a judge exercises discretion to grant it.

It was rational for Congress to treat more harshly those who violate supervised release than those who violate probation. A person violating supervised release is necessarily a person who has not complied even after experiencing jail. A person on probation, by contrast, likely has never been to jail, and may not need any lengthy imprisonment upon revocation. To a defendant on probation from a Hobbs Act conviction, 60 days in jail will seem an eternity.

Supervised release provisions also contemplate the conversion of supervised release terms into imprisonment. The supervised release statute gradates the term's length based on the seriousness of the offense involved. *Id.* § 3583(b). It also specifically limits the imprisonment available for revocations of supervised release based on the class of felony involved. *Id.* § 3583(e)(3).

The probation statutes, by contrast, do not gradate the term of probation based on the type of felony involved. Probation terms as long as five years are available even for misdemeanors. No specific statutory limits are placed on the terms of imprisonment available upon revocation, since the resentence is to be determined by reference back to the "sentence that was available under subchapter A at the time of the initial sentencing".

The Sixth Circuit noted "[t]he inherent differences between supervised release and probation." *United States v. Stephenson*, 928 F.2d 728, 730 (6th Cir. 1991):

> In probation, because the defendant will not have served time for his offense, the court may consider the guidelines range of the original offense as the possible incarceration period. In supervised release, however, the individual will have already served time, possibly the maximum allowed under the Guidelines. . . . The possibility of reincarceration for violation of a condition of supervised release is a cornerstone of the sentencing structure.

Id. at 730-31 (supervised release revocation penalties may exceed those for probation violations). *See Granderson*, 969 F.2d at 984.

3. These distinctions explain why Congress used such different language in §§ 3565(a) and 3583(g).

a. Under § 3583(g), drug possession on supervised release requires the defendant to serve the resentence "in prison." This language is conspicuously absent from the probation statute, § 3565(a). This distinction mirrors the *general* revocation language for supervised release and probation:

[The court may] revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.	[The court may] revoke a term of supervised release and require the person to serve *in prison* all or part *of the term of supervised release* without credit for time previously served on postrelease supervision. . . .
18 U.S.C. § 3565(a)(2).	18 U.S.C. § 3583(e)(3) (emphasis added).

Supervised release revocations *always* vary from probation revocations. Supervised release revocations involve imprisonment, the length of which is determined by referencing the "term of supervised release." With probation, by contrast, revocation does not necessarily involve imprisonment, and the resentence is not based on the length of probation, but on the sentence "available under subchapter A at the time of the initial sentencing."

It is quite "natural" that the mandatory revocation provisions for drug possession would track these important distinctions in the general revocation statutes. The fact that the phrase "in prison" is included in § 3583(g) and absent from § 3565(a) – a point ignored by the Solicitor General – undermines the Government's claim that, following probation revocation for drug possession, there is "no doubt" imprisonment must be ordered in its stead. Gov't Br. at 14. The doctrine of *inclusio unius est exclusio alterius*, at the very least, casts substantial "doubt" on this conclusion.[5]

Within Mr. Granderson's 0-6 month range, numerous sentences other than incarceration were "available . . . at the time of the initial sentencing." The Court, after revocation under (a)(2), remains free to impose restrictions on liberty less confining than actual incarceration, such as community confinement, inpatient drug treatment, and home confinement. *See* U.S.S.G. § 5C1.1(c)(2). The fact that the Government's reading of § 3565(a) would "make no sense at all" without an implied incarceration term, Gov't Br. at 15, does not call for this Court to infer it – particularly given § 3565(a)'s conspicuous failure to include the words "in prison." It calls instead for rejection of the Government's view as not unambiguously flowing from a natural reading of the statute.

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[5] The Government argues that "every court of appeals that has addressed the issue acknowledge[s] that the mandatory revocation provision of Section 3565(a) requires the imposition of some term of imprisonment." Again, the Government ignores an important point – that the issue of whether imprisonment (as opposed to less restrictive confinement) must be imposed under § 3565(a) was not raised in any of these cases except the instant case, in which the court of appeals did not address the issue. 969 F.2d at 981 n.1. *See* 92-8824 Cross-Pet. Reply at 4 note 2. No precedent can be gleaned from judicial silence. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984); *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37-38 (1952); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) ("The glory of the Anglo-American system of adjudication is that general principles are to be tested in the crucible of concrete controversies.").

b. The differences between probation and supervised release also explain why Congress used "original sentence" rather than "term of probation" in § 3565(a). This is not "slightly different language" in the statutes, Gov't Br. at 27; rather, notable differences exist in very short statutes passed side-by-side. If Congress wanted parallel treatment, it would have used more parallel language than was used here.

4. In addition, the Government's reading of §§ 3565(a) and 3583(g) does not lead to "parallel" treatment. Instead, it causes an anomalous result in which probationers are treated more harshly for the same violation than defendants on supervised release.

As noted, supervised release terms are specifically graded by offense type. The maximum term is one year for misdemeanors and Class E felonies, and three years for Class C and D felonies. Five-year terms of supervised release are not even available except for Class A and B felonies – crimes so serious that they cannot even yield probation. 18 U.S.C. § 3583(b). No such gradations exist for probation. Probation terms as long as five years are available even for misdemeanors. *Id.* § 3561(b).

The Government's interpretation of § 3565(a) means that, for the same violation, the least culpable persons (probationers) often will be treated more harshly than the most culpable (those who needed prison and supervised release). Under the Government's view, drug possession causes those with 5-year terms of probation – even misdemeanants – to face 20 months in prison. On the other hand, those same misdemeanants could only have received a maximum of one year of supervised release. Thus, a misdemeanant who possessed drugs while under the maximum one year of supervised release would face a mandatory jail term of four months – *five times less* than his less culpable, probationary counterpart. The disparity in maximum revocation sentences is even greater, since unlike probation, statutory limits exist on resentences following revocations of supervised release. *Id.* § 3583(e)(3).

If Mr. Granderson had been a less admirable person, and had received the top of his guideline range (6 months), he

could have received no more than three years of supervised release to follow. If he then possessed drugs, his mandatory minimum would have been one-third of 3 years – 12 months, for a total of 18 months – two months less than the 20-month minimum suggested by the Government, and *eight months less punishment for the same violation*. The Government's view does not give Mr. Granderson parallel treatment to an equal counterpart on supervised release. He faces higher penalties for the same violation than a more culpable counterpart.

In sum, §§ 3565(a) and 3583(g) do not "call for parallel treatment." Nothing in the statutory language or legislative history says they are parallel. There are good reasons why Congress would not have wanted them parallel. Finally, the Government's interpretation is not parallel. This Court should not presume that the linguistic differences in these short statutes was accidental. *Cf. Liparota v. United States*, 471 U.S. 419, 430 (1985) (Congress' intent "not immediately obvious"; "there are no doubt policy arguments on both sides"); *Bifulco v. United States*, 447 U.S. 381, 395 (1980) ("Congress' [omission], alleged by the Government to have been inadvertent, may have been intentional.").

B. The Parole Revocation Subsection of § 7303

The Government's view of § 3565(a) is further undermined by the revocation section for drug possession on *parole*, similarly included in the same section of the 1988 Act as § 3565(a):

> Notwithstanding any other provision of this section, a parolee who is found by the Commission to be in possession of a controlled substance shall have his parole revoked.

1988 Act § 7303(c), *codified at* 18 U.S.C. § 4214(f). The Government ignores this section in its *in pari materia* analysis of § 7303's so-called "parallel" provisions.

While parole must be revoked for drug possession, no mandatory revocation penalty is specified. The likely reason

is that parole revocation guidelines already existed. *See Albernaz v. United States*, 450 U.S. 333, 341 (1981) ("it is appropriate for [this Court] 'to assume that our elected representatives . . . know the law.' ") (citations omitted). *See also* S. Rep. 98-225, *supra* (extensive discussion of parole guidelines).

The parole revocation guidelines reveal that Mr. Granderson's analysis of § 3565(a) is the more natural view. The parole guidelines consistently rate "simple possession" of drugs as a "Category One" violation. 28 C.F.R. § 2.20, at ¶ 902 (heroin); ¶ 912 (marijuana and hashish); ¶ 922 (cocaine offenses); ¶ 932 (other illicit drug offenses) (July 1, 1988). This yields the following revocation ranges, depending on the parolee's salient factor score:

OFFENDER CHARACTERISTICS: PAROLE PROGNOSIS (SALIENT FACTOR SCORE 1981)

Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
<=4 months	<=8 months	8-12 months	12-16 months

28 C.F.R. § 2.20. These are the revocation ranges for persons possessing drugs while on parole – for persons who went to jail and still possessed drugs after their release on parole.

The Government's interpretation of § 3565(a) would yield a *minimum* sentence for probationers possessing drugs that is higher than the *maximum* presumptive sentence for parolees possessing drugs who have the *very worst* criminal records. This is the same odd disparity as that noted above in the supervised release context.

It is unlikely that Congress passed a law in which drug possession by the least culpable persons (those who received probation, even under the guidelines) often leads to minimum penalties that are harsher than the maximum presumptive penalties for the most culpable persons (those who had been sentenced to prison and later released under parole or supervised release – even the worst of these offenders). Indeed, the Government's view would cause Mr. Granderson to face a

minimum revocation sentence, for possessing drugs on probation, that is eight months higher than the *maximum* he could have faced if he had been *convicted* of possessing the same drugs *in prison*. 18 U.S.C. § 1791(a)(2).

Congress' reliance on the parole revocation ranges is consistent with its similar reliance on sentencing guideline ranges as the one-third standard from which to derive probation revocation penalties. Because most probationers would be equivalent to parolees with good salient factor scores of 6-10, who would face similar parole revocation ranges of *0-4* or *0-8* months, the statutory context strongly favors the court of appeals' interpretation. This is especially true since ranges for drug possession under the Sentencing Commission's new revocation guidelines also fall into this spectrum of seriousness. *See* U.S.S.G. § 7B1.4 (eff. Nov. 1, 1991) (Grade C offense ranges from 3-9 to 8-14 months). *See also* 28 U.S.C. § 994(a)(3) (1984 Act authorizes Commission to promulgate revocation guidelines).

IV. The Possible Applications of the Statute Favor the Court of Appeals' Analysis

A. Technical Application: Guideline Ranges Work Better Than Probation Terms

1. The fact that Congress apparently was comfortable with a "range" in a parole context also undermines the Government's claim that it is somehow "awkward" for "original sentence" to refer to a defendant's guidelines range. The use of a range is not awkward or even unusual. On other occasions, Congress has specifically referred to sentencing guideline ranges as "sentences." 18 U.S.C. § 3742 (allowing appeals if sentence imposed is higher or lower than "the sentence specified in the applicable guideline range").[6]

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[6] To paraphrase the Government, Congress' reference to guideline ranges as "sentences" similarly "make[s] clear that Congress did not mean to exclude the guideline range sentence when it referred to the defendant's 'original sentence' in connection with the drug-possession revocation provision in Section 3565(a)." Gov't Br. at 12-13.

The language chosen by Congress was not "awkward" but a natural understanding that Mr. Granderson's "original sentence" meant his guidelines range. Indeed, such a reading is essential. A district court could not declare a sentencing range to be "incorrect" on remand under Fed. R. Crim. P. 35(a)(2) unless the phrase "original sentence" in that rule is interpreted to mean, or at least include, a defendant's guidelines range.

2. By implication, the Government is attempting to suggest that, by avoiding a range, it presents a more stable option. A term of probation, however, is not static. A "court may modify, reduce, or enlarge the conditions of a sentence of probation at any time" prior to its expiration. 18 U.S.C. § 3563(c).

Suppose three first offenders are given 3-year terms of probation. Defendant A does well, and his probation is reduced to a 1-year term. Defendant B fails to submit monthly reports, and her probation is extended to five years. Defendant C is arrested for a new offense, and while probation is not extended, it is modified to include six months of confinement in a halfway house.

If each of these defendants then possesses a controlled substance, what is the Government's "original sentence"? Use of the initial 3-year terms of probation would yield identical 1-year sentences for each (since it exceeds their 3-9 month revocation guidelines, U.S.S.G. § 7B1.4), despite different culpability levels. Use of the term of probation in effect at the time of revocation would fare no better. Even if this were an acceptable reading of the word "original," Defendant C, the worst offender, would receive a lower mandatory minimum than Defendant B.[7] This difficulty reveals the problem in

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[7] This scenario is not limited to modifications. Suppose Defendant D initially receives five years of probation, while Defendant E, a much riskier person, receives an actual restriction on liberty – 6 months in a halfway house – as part of a 3-year probation term. If both possess drugs on probation, the Government would impose a far higher mandatory minimum on the less culpable Defendant D (20 months) than on Defendant E (12 months).

adopting only the length, and not the type, of what the Government calls the "original sentence."

The sheer "length" of a probation term is perhaps the *worst* barometer Congress could have chosen as a standard for revocation punishment. Judges often struggle far less, in deciding whether to give a 5-year or 4-year term of probation, than they do in deciding whether to add a single week in a halfway house as a condition of that probation. This Court itself has noted that probation and incarceration are not interchangeable or even analytically comparable. *See Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989) ("imprisonment is an 'intrinsically different' form of punishment" than probation) (citations omitted). *Compare Frank v. United States*, 395 U.S. 147, 152 (1969) (actual *imposition* of three years' probation not onerous enough to require jury trial) *with Baldwin v. New York*, 399 U.S. 66, 69 n.6 (1970) (mere *potential* sentence of incarceration in excess of six months requires jury trial). "[P]robation and incarceration are like the proverbial apples and oranges." *Gordon*, 961 F.2d at 432. It cannot be assumed that Congress based the length of a prison term, which is meant to punish the offender, on the length of a defendant's term of probation, which is meant to serve the purpose of rehabilitation. *Id.* at 433 ("legal alchemy to transform three years probation into one year imprisonment"). The Government's view causes a probationer who successfully completes 4½ years of a 5-year probation term to face a mandatory revocation sentence 8 months higher than one who cannot complete a week of a 3-year term.

In contrast to the constantly changeable length and conditions of probation, the established guideline range remains constant. This range is not something that a court will or can "modify, reduce or enlarge" at a later date. It was, and remains, the constant "origin" of the "sentence."

3. The Government nevertheless criticizes lower courts' use of the top of the range as the standard from which the one-third sentence is to be estimated. The fact that these courts do not adopt a more lenient "one-third" standard does not mean that they "disregard the logic of their own statutory analysis." Gov't Br. at 21. Rather, it means only that the

Government errs in its later claim that these courts are reluctant to impose harsh sentences.

The lower courts use the top of the range because one-third of the "original sentence" means one-third of "any other sentence that was available under subchapter A." If a person agreed to buy "any other inventory that was available," that person likely would mean the maximum amount. By using the top of the range, the one-third minimum varies based on the seriousness of the offense and the characteristics of the offender. Surely this is a more "logical" view than the Government's, which arbitrarily links the minimum to a probation term designed to rehabilitate.

4. What would be harder to imagine is the analysis suggested by the Government. The 1988 Act mandates probation revocation both for drug possession, § 3565(a), and for gun possession, § 3565(b). The Government's view is that, if Mr. Granderson had illegally possessed guns on probation, he faced revocation but no minimum sentence, but because he tested positive for drugs, he must serve at least 20 months in jail. Nothing suggests that Congress wanted this vast disparity, particularly given the corresponding crimes for such offenses. *Compare* 18 U.S.C. §§ 922(g) & 924(a)(2) (10-year felony for Mr. Granderson to possess a firearm) *with* 21 U.S.C. § 844 (drug possession usually a misdemeanor). While probationers possessing drugs might face slightly higher penalties than those possessing guns, due to § 3565(a)'s minimum "one-third" language, the disparity is not the huge difference the Government suggests.

B. Practical Application: Congress Did Not Mean What the Government Claims

1. The Government's suggested application creates profound problems in § 3565(a)'s application. Because five-year probation terms are permitted for misdemeanants, the Government's interpretation causes such persons to spend 20 months in jail if drugs are possessed on probation – *more than the statutory maximum* for misdemeanors. 18 U.S.C.

§ 3581(b).[8] *See also McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (rejecting due process challenge to "preponderance" standard of proof on sentencing enhancement, but only because enhancement did not alter statutory maximum that already existed). This Court should read § 3565(a) in a manner that avoids these statutory and constitutional concerns.

2. Numerous other statutory disparities exist, with similarly illogical results. *See, e.g., Clay*, 982 F.2d at 962-63 (explaining how the top of Ms. Clay's guideline range, even if combined with a separate conviction for simple possession, would yield a maximum combined sentence less than the Government's suggested minimum sentence for a mere revocation; exposure more than doubles). The Government's interpretation, in other words, is "likely to lead to curious consequences. . . . Yet there is not a shred of evidence to suggest that this is what Congress intended." *Busic v. United States*, 446 U.S. 398, 407 (1980).

3. The Government's view is even more disturbing when the Sentencing Commission's revocation guidelines are considered. The Commission typically has been careful in writing guidelines to track mandatory minimums. *See, e.g.*, U.S.S.G. § 2D1.1 Background (guideline base offense levels "proportional to the levels established by statute"). With probation violations, however, being "in possession" of a controlled substance, without more, is a "Grade C" violation. *See id.* § 7B1.1(a)(1) & Application Note 3 (cross-referencing *id.* § 4B1.2(2); "controlled substance offense" does not include simple possession). Because Mr. Granderson had a Criminal History Category of I, his revocation guideline range would be only 3-9 months. *Id.* § 7B1.4.

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[8] The Government in its certiorari petition attempted to confuse this problem. Gov't Pet. at 8 note 3 (claiming that "[i]n some cases – frequently cases involving misdemeanors," the guidelines limit probation terms to 3 years). The guidelines do not tie maximum probation terms to whether an offense is a felony or misdemeanor. The terms instead are tied to the offense level. U.S.S.G. § 5B1.2. The guidelines allow 5-year probation terms for anyone, including misdemeanants, with offense levels of 6 or more.

In fact, Mr. Granderson's range under the revocation table if he had *manufactured or distributed* controlled substances would have been only 12-18 months. *Id.* § 7B1.4. The Government's view of § 3565(a) would cause Mr. Granderson, who merely possessed drugs while on probation, to face a *minimum* revocation sentence that is higher than the presumptive *maximum* he would face for manufacturing or distributing those drugs on probation. Even without statutory ambiguity, the Government's view of § 3565(a) would "produce a result so absurd or glaringly unjust as to raise a serious doubt about Congress's intent," *Chapman v. United States*, 111 S. Ct. 1919, 1926 (1991), independently justifying the use of lenity.

4. The Government's view also would eliminate courts' ability to cure such disparities. If Mr. Granderson initially had been given 20 months in jail, he could have appealed that sentence, 18 U.S.C. § 3742(a)(3), even if the increased sentence was based on his possession of controlled substances on bond. Indeed, if he demonstrated drug rehabilitation, he might have appealed the denial of a downward adjustment on that ground. *See United States v. Harrington*, 947 F.2d 956, 962-63 (D.C. Cir. 1991).

No similar review would be possible under the Government's view of § 3565(a). Even though Mr. Granderson's sentence would be nearly 3½ times his applicable guideline range, it would be based on a probationary term he was never able to appeal, since his term of probation was imposed within his applicable guidelines. U.S.S.G. § 5B1.2(a)(1). The Government's view thus "would frustrate one of the prime objectives Congress had in view when it established the Commission and directed it to develop the guidelines," *Harrington*, 947 F.2d at 960, namely, "avoiding unwarranted sentencing disparities." 28 U.S.C. § 991(b)(1)(B).

5. The Government disputes this point. It claims for the first time that Mr. Granderson's probationary term was not imposed within his applicable guideline range. Gov't Br. at 16. This interpretation is incorrect. The Government does not explain what "zero" in Mr. Granderson's 0-6 month range means if it is not permission to grant probation. The Sentencing Commission confirms that probation is authorized within

a 0-6 month range. *See* U.S.S.G. Ch. 5 Introductory Commentary ("A sentence is within the guidelines if it complies with each applicable section of this subchapter"); *id.* § 5C1.1(a) ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.").

Indeed, accepting the Government's analysis would give the Government an unwarranted right to appeal every term of probation that is ever imposed, by claiming that a district court's grant of probation represents a failure to sentence the defendant within the applicable guideline range. 18 U.S.C. § 3742(b). This is not the law; the lower court stayed within the range in imposing Mr. Granderson's term of probation.[9]

6. "Original sentence" is a short-hand reference to the immediately preceding language in § 3565(a)(2). This is less "weight to bear" than the Government's view of one-third of the original sentence, as meaning "in prison, for one-third as long as the length of the probation term, not the length of the fine-payment term, initially imposed, disregarding whatever

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[9] Even where a district court does depart, the proper procedure is for the court to move from the applicable range *to* another range, which is then *adopted* as the established guideline range. A sentence is then imposed within this established range. *See, e.g., United States v. Adudu*, 993 F.2d 821, 823 n.1 (11th Cir. 1993); *United States v. St. Julian*, 922 F.2d 563, 570 (10th Cir. 1990); *United States v. Ferra*, 900 F.2d 1057, 1061 & 1064 (7th Cir. 1990); *United States v. Kim*, 896 F.2d 678, 685 (2d Cir. 1990); *United States v. Munna*, 871 F.2d 515 (5th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990). This Court, in *Williams v. United States*, 112 S. Ct. 1112 (1992), explained how a sentencing court, after finding a defendant's criminal history category inadequate:

> looked to the next highest criminal history category, for which the guideline range was 21 to 27 months. The court then sentenced Williams to 27 months' imprisonment and explained that it was selecting a sentence at the high end of the [new] guideline range. . . .

Id. at 1117 (citations omitted). "Original sentence" refers not to "rejected" ranges, Gov't Br. at 19, but to the guideline range established for defendants after departures are taken into account.

restrictive conditions might have been placed on that probation and affected its length, and even if that term of probation has since been modified and the initial probation length no longer even exists."

C. The Government's Optional "Plain" Meaning

Recognizing its problems, the Government argues what is, in essence, a fall-back position: that "if 'original sentence' really means 'maximum available sentence,' . . . the appropriate benchmark for purposes of § 3565(a) should be the maximum sentence authorized by law for the defendant's crime." Gov't Br. at 22.

The Government's decision to posit optional "plain" meanings of § 3565(a) implicitly concedes its ambiguity. Moreover, the Government's fall-back position should be rejected on its merits. Use of the statutory maximum as the benchmark does not flow from the statute's "plain" meaning. Although eight courts of appeals have now examined this issue, not one has even suggested the statutory maximum as a possible meaning of "original sentence," much less the "plain" one. In this case, the Government not only failed to argue this below, but also conceded just the opposite:

> [The Government's view] appears to expose Granderson to a possible sentence of sixty months incarceration. At oral argument, *the government disputed this interpretation* and contended that the minimum term of incarceration [for revocation under § 3565(a)] was also a maximum sentence [because its proposed 20 month minimum exceeded Mr. Granderson's revocation guidelines].

Granderson, 969 F.2d at 984 n.4 (emphasis added). Only after the court of appeals noted that this concession "points out another difficulty with the government's reading of the provision," *id.*, did the Government change its argument before this Court. *Cf. Evans*, 112 S. Ct. at 1891 ("The complete absence of support for the dissent's thesis presumably explains why it was not advanced by petitioner in the District Court or the Court of Appeals.").

Use of the statutory maximum also yields even more irrational disparities than the Government's previous "plain" meaning. Class C felonies, which may give rise to probation, 18 U.S.C. § 3561(a), carry up to 25 years in prison. *Id.* § 3559(a)(3). The Government's fall-back view would subject a Class C felon, who had a single drug relapse on probation (regardless of the type or quantity of drug), to a minimum of 8⅓ years in jail – more than eight times the statutory maximum for a drug possession conviction, far more than the sentences for many drug distribution convictions, and more than any presumptive revocation sentence for any offense (including murder) under the revocation guidelines. U.S.S.G. § 7B1.4. It also would require imposition of a $ 83,333.33 fine. It cannot be said that this is what Congress "plainly" intended.

V. The Legislative History of § 3565(a) Supports the Court of Appeals' Analysis

The Government thus seeks refuge in the legislative history. Despite claiming a silent record on § 3565(a), the Government boldly states that "there is no doubt that the Members of Congress who voted for the 1988 Act did so with the full understanding and intention that it would provide harsh medicine for persons who chose to use or possess illegal drugs." Gov't Br. at 24-25.

Legislative history, even when in the Government's favor, should not be allowed to cure ambiguity arising from a statute's language, context and application. *R.L.C.*, 112 S. Ct. at 1340 (Scalia, J., concurring). *Cf. id.* at 1338 n.6 (majority opinion; issue "not raised and need not be reached in this case"). Even if it can, § 3565(a)'s legislative history shows that Congress did not prescribe any medicine as "harsh" as the Government suggests here.

A. The Legislative History of the 1988 Act Reveals a "Measured" Approach

1. The amendment's lack of clarity has roots in its hurried consideration. On October 19, 1988, two days before it passed, the bill had not been printed and was "not there to be distributed and shown." 134 Cong. Rec. at S16803 (Sen. Moynihan). The bill was "very, very complex." *Id.* at S16939 (Sen. Pryor). Its provisions ranged from alcohol warning labels to child pornography. It was the last item voted upon before adjournment for the "few weeks remaining before election day." *Id.* at H11245 (Rep. Lent).

When the final version reached the floor, Rep. Kastenmeier stated, "I must in all candor . . . note that the process we have adopted to take up this bill is not an example of Congress at its best. . . . [W]e need to adopt a more rational and deliberative process." *Id.* at H11247. As noted by Rep. Conte:

> Mr. Speaker, I want everyone to take note. Here we are facing a document that looks more like a telephone book than a piece of legislation. It is the last day of the session. And it is not a continuing resolution.
>
> The Appropriations Committee did its work. We got our bills done. And yet here we are 2 weeks late, trying to pass a bill that contains Lord only knows what.

Id. at H11245. The House, which had never seen any version of § 7303 before the bill returned from Conference, began its first and last debate shortly before 12:30 a.m. on October 22, 1988. *Compare id.* at H11108 (start of House debate) with *id.* at H11110 (noting time as 0030). Later that night, Senator Dole, who essentially began Senate debate on the bill's final version, was "cognizant that it is 2:20 in the morning" and promised "not to take long." *Id.* at S17303. *Cf. Busic*, 446 U.S. at 405; *Bass*, 404 U.S. at 343-44 (rule of lenity applied where laws passed with little discussion, no hearings and no report).

2. The Government claims that other provisions of the Act prove Congress must have intended to maximize § 3565(a)'s penalty. *Cf. Busic*, 446 U.S. at 409 (criticizing "stark and unidimensional quality of any calculus which attempts to construe the statute on the basis of an assumption that . . . Congress' sole objective was to increase the penalties . . . to the maximum extent possible"). When these provisions are examined, however, the Government's draconian view of § 3565(a) seems out of line with the legislative history.

a. The Government cites § 6480 of the 1988 Act and claims that it contains "enhanced penalties for simple possession." Gov't Br. at 24. The Government does not describe these "enhanced penalties." The reason is that § 6480's change was moderate – elimination of the special low caps on maximum fines. Congress did not increase the mandatory minimum penalty of a $1000 fine for first convictions, or the mandatory minimum penalty of 15 days in jail and a $2500 fine for repeat convictions.[10]

The penalties for drug possession after the 1988 Act are consistent with the court of appeals' interpretation of § 3565(a), in which Mr. Granderson faces a minimum of 60 days in jail – four times more than 21 U.S.C. § 844's minimum for *repeat* offenders – without even being convicted of drug possession. They are not in line with the Government's minimum sentence of *more than 40 times* that penalty.

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[10] Even while eliminating the maximum fines, the 1988 Act enacted a new, *reduced* alternative for persons possessing a "personal use amount" of drugs: civil penalties in lieu of criminal prosecution. 1988 Act § 6485; *see also id.* § 6486(b) (factors in decision "whether to assess a civil penalty under this section *or* to prosecute the individual criminally") (emphasis added). Under this civil penalty, a possessor may avoid even the mandatory criminal fines. *Id.* § 6486(f) (Government has unlimited right to compromise, modify or remit claims). The civil defendant retains various procedural protections. *Id.* § 6486(g). Unless the user has a previous drug conviction, this civil alternative can even be utilized *twice*. *Id.* § 6486(c) & (d). Even expungement of records is possible if the user follows certain conditions. *Id.* § 6486(j). 102 Stat. 4384-86.

b. The Government also claims that the 1988 Act mandated that "*persons who possess* illegal drugs *are to be denied* federal benefits," and that "public housing tenants who engage in illegal drug-related activity *will have their tenancies terminated*," Gov't Br. at 23 (emphasis added). These statements are incorrect. The loss of federal benefits is not automatic, universal or certain.

The Act states only that those *convicted* of drug possession, at the *discretion of the court*, may be denied such benefits. 1988 Act § 5301(b)(1)(A). Even for drug *traffickers*, and those with a *second or subsequent conviction* of drug possession, loss of federal benefits remains discretionary. *Id.* § 5301(a)(1)(A) & (B); § 5301(b)(1)(B). Only after a *third trafficking* conviction are benefits automatically withheld. *Id.* § 5301(a)(1)(C). 102 Stat. 4310-11. Even then, many federal benefits are exempt. *Id.* § 5301(d)(1)(B), 102 Stat. 4311 ("Federal benefit" "does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit . . . "). Public housing sanctions similarly provide only that drug-related criminal activity is "cause for termination of tenancy." *Id.* § 5101, 102 Stat. 4300. Finally, even non-exempt, withheld benefits are restored if the possessor agrees to long-term treatment, or is rehabilitated. *Id.* § 5301(b)(2), 102 Stat. 4311. Rather than harsh medicine, "the compromise reached by the House and Senate takes a cautious approach toward user accountability and will allow us time to study the effect of this policy." *Id.* at H11243 (Rep. Jeffords, ranking Republican on Education and Labor Committee).

c. The Government also claims that the Act requires federal contractors and grant recipients to maintain drug-free workplaces and discipline employees using drugs. Gov't Br. at 23. This argument ignores the amendment's background. The 1988 Act actually overruled the Administration's "zero tolerance" policy that was already in place. Under that policy, the Customs Service had tried to force commercial fishing groups to sign agreements requiring owners to search vessels before departure, drug-test employees, and sign a written "zero tolerance" goal. One legislator noted these "excessive

efforts by those involved in the drug war that we are correcting in this bill." *Id.* at H11242 (Rep. Young).

> However, with the extremely high level of controversy which has surrounded the administration's zero tolerance policy we have lost the support of a significant portion of the population who also question its effectiveness and fairness. Let's face it, that's why we are enacting these provisions today because, in the minds of the public, this is Government policy gone awry. It symbolizes unfairness. . . .

Id. at H11268 (Rep. Davis). *See also id.* at S17303 (Sen. Dole) (lamenting "retreat in the successful zero tolerance program").

d. The Government also cites to increased penalties for crack cocaine possession. Even these increases, however, were only for "*Serious* Crack Possession Offenses." 1988 Act Title VI Subtitle L (emphasis added). Below specified quantities, physical possession of even crack cocaine remains a misdemeanor. 21 U.S.C. § 844.

e. The Government also cites to other increased penalties in the 1988 Act. Gov't Br. at 24. With one possible exception,[11] none of these provisions increased penalties for simple possession; simple possession of drugs even near a school continues to be a misdemeanor.

4. Legislators did not want to overreact. Senator Dodd stated, "It is important that we maintain the strongest public support for our efforts in our war against drugs, and we

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[11] The one exception is 1988 Act § 6468, 102 Stat. 4376, which apparently increased the maximum (but not any minimum) penalty for possessing *narcotic* drugs, such as heroin, in prison. The new sentencing guidelines Congress ordered the Sentencing Commission to create for such offenses specifically excluded possession. 1988 Act § 6468(c) (guidelines apply only to "a defendant convicted of violating section 1791(a)(1) of title 18"; simple possession provision is (a)(2)). A defendant *convicted* of possessing in jail non-narcotic drugs – such as the type in Mr. Granderson's system here – still faces a maximum penalty of one year in jail and no mandatory minimum. 18 U.S.C. § 1791(b)(4).

undermine that support with overly broad penalties that are potentially unfair and inconsistent in their application." 134 Cong. Rec. at S16916-17. Other supporters concurred. *Id.* at H11218 (Rep. Rangel) (rejecting idea that "we will win the war against drugs by waging it against millions of our citizens"); *id.* at H11229-30 (Rep. Vento) ("We cannot legislate away drug abuse. We must put in place a good and fair policy which is based on common sense.").

Members of Congress were justifiably concerned about fair treatment for users. User penalties affected their constituents and constituents' families. As noted by Senator D'Amato, "1 in 8 Americans over age 12 – 23 million people – use illegal drugs regularly." *Id.* at S17318. Some suggested that the numbers might be higher. *See id.* at S17306 (Sen. Rockefeller) ("As many as 37 million Americans used drugs in 1987. That's 16 percent of our population."). Senator Dole essentially described Mr. Granderson: "The 23 million Americans who use drugs are not a part of the 'counterculture' or 'underclass.' Most of them work, pay taxes, and vote. They are our friends and neighbors." *Id.* at S17324.

5. The Government cites to comments made by certain legislators. Immediately after the end of the Government's quote from Senator Dole, however, he states: "But we recognize that our courts and prisons are seriously overcrowded and cannot bear the burden of processing these new criminal cases." *Id.* at S17303. Dole then notes the Act's "double-edged weapon" against possessors: civil fines and the fact that those convicted of possession "could" be denied federal benefits. *Id.* These are the same "price[s] to pay" identified by Rep. McCollum. *Id.* at H11239. Congress' emphasis on non-incarceration penalties and judicial discretion undermines the Government's claim that Congress surely limited judges' options to heavy jail terms under § 3565(a).

Furthermore, in thanking Senator Domenici, Senator Dole summarized the user accountability sanctions *not* as "harsh medicine," but rather in the following manner:

> The user accountability provisions establish a system of penalties for the users of [drugs] *based on the principle of "measured response."* Senator

> Domenici coined the phrase "measured response," which means that *the penalty for drug use should be proportionate to the seriousness of the offense, consistent with American standards of freedom and justice.*

Id. at S17324 (Sen. Dole) (emphasis added). Rather than having "no doubt" about voting for harsh medicine, "some Senators will say that this bill does not threaten the user with a big enough stick to reduce demand. . . . Others will say that we must do more in terms of rehabilitation and education." *Id.* at S17318 (Sen. D'Amato).

It is true that the 1988 Act increased penalties for certain drug-related crimes, sometimes substantially. The Government errs, however, in assuming "harsh medicine" throughout the 1988 Act. For drugs other than crack cocaine – including heroin and other potent drugs, regardless of quantity – possession remained a misdemeanor, and one of the few federal crimes still permitting first offender treatment. 18 U.S.C. § 3607. Mandatory minimums were to be "commensurate with the seriousness of the crimes committed." *Id.* at S17353 (Sen. Thurmond). To paraphrase from *Busic*:

> As we understand it, the Government's argument is not that our construction reads Congress to have *diminished* the penalty for [drug possession while on probation], but only that our construction fails to enhance that penalty to the hilt. Yet it is patently clear that Congress too has failed to enhance that penalty to the hilt. . . . Thus, while Congress had a desire to deter [probationers' possession of controlled substances], that desire was not unbounded. Our task here is to locate one of the boundaries, and the inquiry is not advanced by the assertion that Congress wanted no boundaries.

446 U.S. at 408 (emphasis in original).

6. The 1988 Act's rushed enactment and "measured" response is mirrored in the instant provision. Section 7303 was submitted as an unnumbered section of a floor amendment on October 14, 1988 – the same day the Senate passed its version of the bill, and only a week before the final bill

was passed. 134 Cong. Rec. at S16170. The Government claims a silent legislative record, and cites to Senator Biden's unhelpful section-by-section analysis of § 7303. The Government ignores the corresponding section-by-section analysis in the House of Representatives:

> Section 7303 relates to the revocation of probation, parole or supervised release when such a person has been adjudicated by the court to have violated a criminal law relating to possession of an illegal drug. The provisions in this section are derived from the Senate amendments to the bill, but have been modified *to preserve essential elements of judicial or Parole Commission discretion.*

Id. at H11248 (emphasis added). In sum, although little can be gleaned from this section's specific legislative history, Congress' expressed desire for judicial discretion is significant. It rebuts the Government's view that Congress gave courts no choice but to impose long terms of imprisonment on probationers possessing drugs.

B. Subsequent Legislative History Confirms That Congress Intended a Measured Approach

This analysis is confirmed by recent legislative history. On February 25, 1993, Senator Thurmond introduced S. 468, because § 3565(a) as previously written was not unambiguous:

> The second critical provision of the bill . . . *clarifies an ambiguity in 18 U.S.C. § 3565(a)* that arises from that provision's language that "the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence."

139 Cong. Rec. at S2150 (emphasis added). Rather than having his bill clarify the ambiguity in the Government's favor, Sen. Thurmond notes that his bill is needed because some courts are "arbitrarily varying the sanction according to the length of the initially imposed term of probation." *Id.* at

S2151. His bill uses U.S.S.G. Chapter 7's revocation guidelines as the standard for resentencing. *Id.* at S2151. For Mr. Granderson, that range would be only 3-9 months. *See Gozlon-Peretz*, 498 U.S. at 406 ("[T]he view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value.").

VI. The Salutary Purposes of the Rule of Lenity Support its Application in this Case

This Court has not hesitated to apply the rule of lenity when statutory ambiguity exists. *See, e.g., United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 (1992); *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Crandon v. United States*, 494 U.S. 152, 168 (1990); *United States v. Kozminski*, 487 U.S. 931, 952 (1988); *Tanner v. United States*, 483 U.S. 107, 131 (1987); *Liparota*, 471 U.S. at 427-28; *Williams v. United States*, 458 U.S. 279, 290 (1982); *Bifulco*, 447 U.S. at 387 & 400-01; *Busic*, 446 U.S. at 406-08; *Whalen v. United States*, 445 U.S. 684, 694 (1980).

1. While a division of judicial authority is not "automatically sufficient to trigger lenity," *Moskal v. United States*, 498 U.S. 103, 108 (1990), the fact that a majority of circuits have rejected the Government's view may suggest that reasonable minds can differ as to § 3565(a)'s interpretation. *United States v. Yermian*, 468 U.S. 63, 78-79 (1984) (Rehnquist, J., dissenting) (fact that "natural reading" did not seem so natural to courts of appeals or dissenters should have indicated that Court's interpretation not compelled). This is not a case in which "one court's unduly narrow reading of a criminal statute would become binding on all other courts," *Moskal*, 498 U.S. at 108. Five separate courts of appeals – including one since the Government filed its brief – now reject the Government's view, often in unanimous opinions, and sometimes with denials of Government requests for in banc reconsideration. *United States v. Alese*, 1993 U.S. App. LEXIS 25110 (2d Cir. No. 93-1198, filed Sept. 28, 1993); *United States v. Diaz*, 989 F.2d 391 (10th Cir. 1993); *Clay*, 982 F.2d 959 (6th Cir.), *reh'g in banc denied*, 1993 U.S. App. LEXIS 7333 (6th Cir.), *cert. filed*, No. 93-52 (U.S. filed July 6, 1993); *Granderson*, 969 F.2d 980 (11th Cir.), *reh'g in banc denied*, 980 F.2d 1449 (11th Cir. 1992), *cert. granted*, 113 S. Ct. 3033 (1993); *Gordon*, 961 F.2d 426 (3d Cir. 1992).

The only three circuits currently adhering to the Government's view are the Ninth, the Eighth, and the Fifth Circuits. The Ninth was the first to address the issue, in *United States v. Corpuz*, 953 F.2d 526 (9th Cir. 1992). Shortly after *Corpuz* issued, its rule was followed without detailed analysis by the Eighth Circuit in *United States v. Byrkett*, 961 F.2d 1399 (8th Cir. 1992). At about the same time *Byrkett* issued, the Third Circuit issued *Gordon*, which rejected *Corpuz*'s rule. Since that time every circuit, except one, that has considered the issue has rejected *Corpuz*'s analysis. Even within the Ninth Circuit, certain judges have openly questioned *Corpuz*. *See United States v. Ohler*, 996 F.2d 1023, 1025 (9th Cir. 1993) ("Ohler makes a serious argument that *Corpuz* was incorrectly decided"); *United States v. Avakian*, 1992 U.S. App. LEXIS 32326 (9th Cir. No. 92-10269 filed Dec. 2, 1992) (Norris, J., concurring) ("I think *Corpuz* was decided incorrectly"), *cert. filed*, No. 92-8656 (U.S. filed May 5, 1993).[12]

The Government's only circuit convert since *Gordon* is the Fifth Circuit, in *United States v. Sosa*, 997 F.2d 1130 (5th Cir. 1993). The *Sosa* opinion, however, twice mistakenly refers to "parole" being revoked under § 3565(a), *id.* at 1133 ("Section 3565(a)(2) . . . states that if a defendant violates a condition of his parole . . . "); *id.* at 1133 n.6 ("when a defendant admits the commission of . . . drug related crimes, in violation of his parole, Congress intends a harsh punishment"), perhaps suggesting that the Fifth Circuit did not

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[12] *Corpuz*'s decision was based in part on its mistaken belief that drug possession was a Grade A violation under the revocation guidelines. 953 F.2d at 530. This was wrong; the term "controlled substance offense" in the revocation guidelines includes only drug offenses involving actual or intended manufacturing or distribution. U.S.S.G. § 7B1.1 Application Note 3; *id.* § 4B1.2(2). Simple possession is a Grade C violation under the revocation guidelines. Thus, *Corpuz*'s analysis was flawed.

examine the issue as carefully as some of the other circuits.[13] *Sosa*'s analysis was recently rejected by a unanimous panel of the Second Circuit in *Alese*.

The Government seeks to minimize these adverse rulings by claiming that lower courts rejecting its view "appear to have done so" not because of statutory ambiguity, "but rather because they view it as an unduly harsh penalty." Gov't Br. at 29. Nothing supports this accusation that the lower courts essentially have abdicated their judicial duties. Contrary to any claim that the court of appeals' decision here was an emotional one, Judge Phyllis Kravitch's opinion states that the Government's interpretation "would lead to unreasonably harsh results *not clearly intended by Congress*." Gov't Br. at 29 note 6. The Government inexplicably disregards the underlined part of this quotation, which reveals that the court of appeals properly applied the rule of lenity only after finding sufficient statutory ambiguity.

2. Applying the rule of lenity would serve its recognized purpose of minimizing risks of selective or arbitrary enforcement. *Kozminski*, 487 U.S. at 952. If the Government's view is adopted, some judges will continue giving the same probation terms, while others, recognizing that probation terms may be tied to harsh revocation sentences, may hesitate to order supervision for as long as otherwise might seem warranted. Some defendants will submit to drug testing, while others who know of § 3565(a) might refuse to be tested, since no minimum exists for such refusals. Some revocation petitions will continue charging drug "possession," while others might charge only drug "use," which again carries no minimum.

Applying the rule of lenity will minimize this risk. No huge disparities will exist between revocation sentences for

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[13] *Sosa* also expressly ignored the historical distinction between probation and imprisonment. *Id.* at 1133. Its review of the legislative history consisted of merely noting that Sosa had cited none, and that the Ninth Circuit had found none. *Id.* at 1134. *Sosa* did not address the "misdemeanor problem" or other disparities that had caused judges in the Ninth Circuit to question the very *Corpuz* decision on which *Sosa* relied.

drug possession and those for every other violation. The incentives causing such arbitrary results will be reduced, if not eliminated.

3. The rule of lenity is "rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should." *R.L.C.*, 112 S. Ct. at 1338. Congress has not clearly said that Mr. Granderson, who received no warning that his receipt of probation vastly increased his jail exposure, must now go back to jail for another 1½ times his guideline maximum, despite his demonstrated rehabilitation.

There is no "overriding consideration of being lenient to wrongdoers" here. Gov't Br. at 30. The court of appeals' ruling, requiring a minimum of 60 days in jail for Mr. Granderson, is four times harsher than any minimum penalty he would face even if convicted as a repeat drug possessor. Because it cannot be said beyond a "reasonable doubt" that the Government's view of § 3565(a) is correct, *Moskal*, 498 U.S. at 108, the rule of lenity must be applied. This case should be treated in the same way as *Bifulco*:

> Our analysis reveals, at the least, a complete absence of an unambiguous legislative decision. . . . Of course, to the extent that doubts remain, they must be resolved in accord with the rule of lenity. If our construction of Congress' intent, as evidenced by the scant record it left behind, clashes with present legislative expectations, there is a simple remedy – the insertion of a brief appropriate phrase, by amendment, into the present language of § [3565]. But it is for Congress, and not this Court, to enact the words that will produce the result the Government seeks in this case.

447 U.S. at 400-01. *Accord Tanner*, 483 U.S. at 131 (unanimous on this point).

CONCLUSION

The district judge did not merely sentence Mr. Granderson, upon revocation, to the top of his established guidelines range. Instead, grudgingly following the Government's advice, the judge ordered him to serve that maximum sentence again, and then again, and then a third as long yet again. The tradition of probation, the language, context and application of § 3565(a), its legislative history, and the rule of lenity all favor the court of appeals' view of "original sentence." The district judge, who stated his hope that Mr. Granderson would appeal and win a reversal, should be told that he can avoid the needless incarceration the Government says is required. This Court should affirm the court of appeals.

Respectfully submitted.

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